United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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74-2651

To be argued by
ETHAN LEVIN-EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2651

UNITED STATES OF AMERICA,

Appellee,

—against—

ORLANDO MIRANDA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
ETHAN LEVIN-EPSTEIN,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Orlando Miranda appeals from a judgment of the United States District Court for the Eastern District of New York (Judd, *J.*) entered on December 6, 1974, after a jury trial, which judgment convicted appellant of (1) possessing with intent to distribute and (2) distribution of approximately 319 grams of cocaine, in violation of Title 21, United States Code, Section 841(a)(1). Appellant was sentenced to a prison term of six years on each count pursuant to Title 18, United States Code, Section 4208(a)(2), the sentences to run concurrently. In addition, appellant was fined $2,500 on the first count. A special parole term of four years was also imposed. Appellant's bail has been continued pending this appeal.

There are three issues on this appeal. The first issue is whether the Government's loss of a wholly inculpatory tape recording necessitates the reversal of the conviction. The second issue is whether the Government was under any

obligation to call two people as witnesses, even though neither person was a witness to any material facts concerning the offense charged. The third issue is whether the district court properly allowed the introduction of relevant evidence concerning events following the period covered in the indictment.

Statement of Facts

A. Government's Case

On January 24, 1974 Gloria Rodas was arrested by federal agents in an unrelated case.[1] She immediately began serving as a cooperating individual for the Drug Enforcement Administration (Appellant's Appendix, 20a).[2] As part of her cooperation, Miss Rodas testified, she agreed to go to the Jaguar Lounge in Queens (A. 21a). On March 1, 1974 she went to the bar and was introduced to the appellant, the owner of the bar (G.A. 22a). She was introduced to him as "Manolo" (A. 17a). At that meeting, she testified, she socialized with appellant until approximately 3:00 A.M. and then left (A. 23a). On March 15, 1974 she returned to the Jaguar Lounge and met with appellant again. At this meeting they discussed drugs for the first time, and the appellant told her that people he knew were in jail but were expected to be released shortly at which time he would know more to tell her (A. 24a). In her undercover capacity, Rodas told appellant that she was

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[1] Rodas entered a plea of guilty to one count of a superseding indictment (74 CR 24; E.D.N.Y.) charging her with conspiracy to import and possess with intent to distribute cocaine. She was sentenced to five years probation by Chief Judge Jacob Mishler prior to her testimony in the trial of this case (Appellant's Appendix, 18a).

[2] References to Appellant's Appendix are hereinafter cited as, "A." References to the trial transcript not produced in Appellant's Appendix, but which have been reproduced in the Government's Appendix, are cited as "G.A."

interested in acquiring about one kilogram of cocaine (A. 25a). Appellant told her they would talk more about it at a later time.

On March 21, 1974, nearly a week later, Miss Rodas returned to appellant's bar and met with him again at approximately 1:30 A.M. At that time he told her that the purchase could be arranged (A. 25a-27a). Thereafter, when Rodas met with appellant during the night of March 21st, he told her that he could supply her with ten ounces of cocaine for ten thousand dollars, and that, as a token of his friendship, he would give her one-half ounce at no charge (A. 31a-32a). They agreed to meet on March 25 to effect the delivery. Rodas' movements on March 21 were corroborated by Group Supervisor McMullen (G.A. 69-70). All of the foregoing negotiations, as well as the final agreement and arrangements were duly reported, by the witness, to Special Agents of the Drug Enforcement Administration (A. 20a-24a, 27a-33a).

Miss Rodas testified that on a number of occasions, when she went to the bar, her friends, "Georgie" and "Toni", were also there (A. 64a, 70a, 79a-82a; G.A. 12), but she clearly stated (never to be contradicted by appellant) that at no time were either of them a witness to any of the private conversations she had with appellant (G.A. 13).

On the afternoon of March 25, 1974, the witness was given $6,000 by the agents in order to purchase the cocaine promised. She was searched, escorted to her car, and followed to the Jaguar Lounge under surveillance (A. 33a-35a). As was previously planned, the appellant met her there and they then left the bar, under surveillance, and were observed driving to an auto body repair shop in Miss Rodas' car (G.A. 38-39). During this period the witness was wearing a clandestine radio transmitter that had been supplied to her by the agents (A. 34a). Following Miss Rodas and the

appellant, in a surveillance car equipped with a radio receiver and tape recorder, were Group Supervisor McMullen, and Special Agents Schnackenberg, Dolan and Castillo. Group Supervisor McMullen (G.A. 71-79) and Special Agents Schnackenberg and Castillo (G.A. 34-43, 100-115) corroborated Rodas' testimony in every respect.

Miss Rodas testified that while she was driving appellant to the garage he told her, in Spanish, that he "had the merchandise with him" (A. 36a). She told him that she couldn't take it all because she did not have all the money, and asked if she could simply take partial delivery and the rest the following week (A. 36a-37a). Appellant declined, stating that there was insufficient time to break up the package, but that she could take the whole amount and pay him the remaining $4,000 the following week (A. 37a). Miss Rodas testified that appellant then produced and opened a package and asked her if she wanted to "taste" its contents. She declined, saying that if he trusted her for the extra $4,000 she would trust him on his representation of quality (A. 37a). He then reached into the back seat and placed the cocaine in an attache case Miss Rodas had left there. She, in turn, gave him the $6,000 and dropped him off at the auto body shop (A. 37a-38a). The entire conversation was overheard and translated for the others by Special Agent Castillo in the following car. It was also recorded simultaneously (A. 96a-108a).[3] Following the delivery of the cocaine to Miss Rodas, she was surveilled to Junction Boulevard and 57th Street in Queens, where the contents of the package were field tested and secured by the agents. Miss Rodas never handled the cocaine herself (A. 39a-40a; G.A. 41-42, 77-78). The package contained approximately ten ounces of narcotics (G.A. 132-133).

[3] The conversation contained in this recording was described, in detail by both Rodas and Castillo during the trial (A. 36a-39a, 106a-107a).

Miss Rodas further testified that on April 2, 1974 she met with the Drug Enforcement Administration agents, was searched, "wired" with a transmitter and given the balance of $4,000 to pay off the appellant (A. 40a). She then met with appellant in the kitchen of his bar and gave him the money (A. 42a-43a). This conversation was also recorded [4] and during its course Rodas and the appellant discussed the possibility of future narcotics transactions. Appellant said that they would have to be discreet because of the large number of policemen that he expected to congregate in his bar during the upcoming baseball season (A. 43a).

On April 19, 1974 Miss Rodas, as part of the continuing investigation, returned to the bar and told the appellant that she had a "brother" in Puerto Rico that she expected on a visit in May. She asked him to meet her brother inasmuch as they were in the same business—cocaine (A. 49a-50a). She further testified that on May 8, 1974 she and Octavio Pinol, an undercover agent posing as her brother, met with appellant in the bar and had a conversation relating to the "favor" appellant had done for Rodas by trusting her for the extra $4,000 (A. 51a-52a).

B. Defense Case

The defendant (a large man of imposing countenance),[5] took the witness stand. His version of the March 25, 1974 automobile ride and conversation was that Rodas asked him to pick up the attache case, which he did (A. 148a). Inside, he said he saw "some white stuff" (A. 149a). He testified somewhat vaguely, that "[Rodas] told [him] it

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[4] This tape recording was disclosed to defense counsel pursuant to his request for discovery and was played for him in the office of the Assistant United States Attorney prior to the commencement of the trial (G.A. 15-16).

[5] Defendant's Exhibit B, reproduced at page 214a of Appellant's Appendix pictures appellant as seated third from the left and Miss Rodas sitting to his immediate left.

was—it was the sign to make [him] nervous" (A. 149a). On cross-examination the defendant was unable to explain this incident in any further detail except to say that while they were discussing his damaged car she told him to pick up the valise and open it. He said that was the first time he saw the white powder (A. 172a-173a). He testified that Rodas then told him that the cocaine was there to intimidate him for some reason unknown to him (A. 173a-174a). He denied the truth of the Government witnesses' testimony. Thereafter the defendant testified that, although he knew the powder was cocaine, he never made any report of the incident to any law enforcement agency (A. 177a-179a).

ARGUMENT

POINT I

The Government's loss of the tape, which was highly valuable to its case, is hardly a basis for imposing any sanction against the Government, much less reversal of this conviction which, even without the tape, was based on overwhelming evidence.

Appellant contends that, because the tape recording of the March 25th conversation between the witness Rodas and the appellant was lost, the conviction should be reversed and the indictment dismissed. He avers that this would be an appropriate sanction for the Government's negligence. He adds that, in the very least, the evidence pertaining to the conversation should have been suppressed.

Appellant's argument is both illogical and without support in the law. It is anomalous to require that the Government be "punished" for having been negligent, when that negligence accrued to the benefit of the appellant.

In *Roviaro* v. *United States*, 353 U.S. 53 (1957), it was held that the Government is not required to either call a confidential informant as a witness or to divulge his identity unless that informant's testimony would be material, non-cumulative or of assistance to the defense. This rule has been followed, time and again in this Circuit. *United States* v. *DeAngelis*, 490 F.2d 1004 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974); *United States* v. *Mosca*, 475 F.2d 1052 (2d Cir.), *cert. denied*, 412 U.S. 948 (1973); *United States* v. *Russ*, 362 F.2d 843 (2d Cir.), *cert. denied*, 385 U.S. 923 (1966); *United States* v. *D'Angiolillo*, 340 F.2d 453 (2d Cir.), *cert. denied*, 380 U.S. 955 (1965); *United States* v. *Coke*, 339 F.2d 183 (2d Cir. 1964); *United States* v. *Cimino*, 321 F.2d 509 (2d Cir. 1963), *cert. denied*, 375 U.S. 974 (1964).

Reasoning by analogy, this same rule is easily and appropriately applied in the case now on appeal. In discussing the so-called "informant's privilege", Mr. Justice Douglas, speaking for the Court, said:

> "Where the disclosure of an informant's identity, or of the contents of his communication, is *relevant and helpful to the defense of an accused, or is essential to a cause*, the privilege must give way." *Roviaro*, *supra* at 60-61 (emphasis supplied).

The same should be said in a case, such as the one at bar where physical evidence, totally cumulative in nature and helpfuf only to the prosecution, has been inadvertently lost. Clearly, the fact that the tape recording was lost in no way prejudiced the defendant. He should not now be permitted to assert that the Government be "punished" for losing evidence when the absence of that evidence actually benefitted his cause on trial. In short, there is absolutely nothing in the record, save testimony of the defendant,[6] to suggest that the tape wasn't exactly as represented by the Government witnesses.

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[6] The District Court made a finding of fact that "[t]he jury accepted Ms. Rodas' testimony and rejected defendant's explanation" (A. 224a).

On appellant's motion for judgment of acquittal or, in the alternative, a new trial, Judge Judd made the following findings of law and fact:

> "In this case, defense counsel have not indicated any major differences in procedure which would have been followed at the trial had the loss of the tapes [sic] been known from the beginning. There were at least three witnesses to the March 25 conversation: Ms. Rodas, Agent Castillo, and the defendant, all of whom testified. Agents McMullen and Schnackenberg heard Mr. Castillo's contemporaneous translation of the conversation. They were not permitted to testify as to what he said, *but their testimony might counter any claim that the tape would have been exculpatory.* If the tape had been preserved it might *conceivably* have shown that all the government witnesses were lying, *but it might also have confirmed the government witnesses' testimony and been of no avail to the defendant.*
>
> The defense had a long week-end in the middle of the trial to seek out any further information concerning the loss of the tapes [sic]. The defense was permitted to cross-examine the government agents concerning the missing tape, and had full opportunity to make the most of the matter in the summation to the jury.
>
> While the missing tape could have been of significant use to the defendant, *if it contradicted the testimony of government witnesses,* and while its loss indicates negligence on the part of the government agents, the Court cannot find that the loss was intentional or in bad faith or that the absence of the tape deprived defendant of the right to a fair trial" (emphasis added) (A. 229a-230a).

Judge Judd's finding that this was an innocent, good faith loss is significant. Cf. *United States* v. *Bryant*, 448 F.2d 1182 (D.C. Cir. 1971).[7] If the evidence had supported a finding of wilful destruction or suppression of evidence then it might be proper to infer that the tape was helpful to the defendant. But such was not the case here.[8]

In sum, considering that there was no intent to destroy the tape; that regular efforts were made to preserve it; that neither witness used it to refresh their recollection; that there was substantial evidence against the defendant above and beyond the actual substance of the conversation; that diligent efforts were made to find the tape long before any request for disclosure was made; and finally that the Government had no obligation to do anything more than it did, it is respectfully urged that there is no basis upon which my relief should be granted appellant.

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[7] In fact *Bryant* and its progeny support the Government position and rebut the contention of the appellant. In *United States* v. *Sewar*, 468 F.2d 236, 238 (9th Cir. 1972), it was held that:

> "Not every blunder by investigators should result in the exclusion of relevant competent, important evidence."

See also, United States v. *Love*, 482 F.2d 213 (5th Cir. 1973); *United States* v. *Lemoniakis*, 485 F.2d 941 (D.C. Cir.), *cert. denied*, 415 U.S. 989 (1973); *United States* v. *Ashe*, 478 F.2d 661 (D.C. Cir. 1973).

[8] As soon as defense counsel became aware of the lost tape he requested permission to inquire into the loss by recalling government witness Schnackenberg, which permission was granted. He also subjected Group Supervisor McMullen (G.A. 85-97) and Special Agent Castillo to extensive cross-examination on the subject (A. 100a-106a, 108a-119a). During this testimony it was brought out that the tape had been made and that it was relatively free of distortion (G.A. 88). The tape was transported back to the agents' office where Agent Castillo reviewed a small portion of it (A. 98a). After this it could not be found, despite repeated efforts to locate it. The efforts were made again, shortly before the trial, at the request of the Assistant United States Attorney (A. 102a-103a). There was no evidence that the tape had been intentionally destroyed or withheld.

POINT II

The fact that "Georgie's" and "Toni's" identities were not disclosed until the trial commenced is irrelevant.

Appellant seems to contend that he was somehow prejudiced by the fact that neither "Georgie" nor "Toni" was produced and called as a witness for the Government. He appears to argue that since the Government failed to disclose their true names before the trial, the conviction should be overturned.

Appellant's position is without support and his reliance on *United States* v. *Baum*, 482 F.2d 1325 (2d Cir. 1973) is unfounded. First, the Government was under no obligation whatsoever to even inform the appellant of the existence of these two women. Second, even assuming, *arguendo*, that they were material witnesses, the Government was under no obligation to find or produce them for appellant. Third, appellant's trial counsel *did* have the opportunity to call "Georgie" as a witness and declined.

In *Roviaro* v. *United States*, 353 U.S. 53, 61-62 (1957) it was held that where an individual's testimony is relevant and helpful to the accused's defense, the identity of that witness must be disclosed. Although no "litmus-paper" test was announced by the Court to determine whether or not a witness is material, there is no question but that the first issue to be decided is whether or not the individual is a witness at all.

Appellant misrepresents the record when he asserts that "both of these women were admittedly present at virtually all of the conversations with the appellant concerning drug transactions" (Appellant's Brief at 34).

In fact the record is exactly contradictory of this claim. Although Miss Rodas testified that on numerous occasions she had met friends at the Jaguar Lounge (A. 62a, 66a, 72a), two of whom she identified as "Georgie" and "Toni", she explicitly stated that all conversations she had with appellant were carried on in private and no one ever heard any part of the discussion (G.A. 13). There is certainly no doubt whatsoever that neither "Georgie" nor "Toni" was present at or had anything to do with the distribution of the cocaine from "Manolo", the appellant, to Miss Rodas on March 25 (A. 36a-39a; G.A. 21-23). Clearly, then, neither "Georgie" nor "Toni" could be considered witnesses whose "testimony may be relevant and helpful to the accused's defense". *Roviaro* v. *United States*, *supra* at 62.

In fact, appellant would be straining the definition of the word to even classify them as "witnesses". This analysis is supported by counsel's own statement to the Court after the Government had provided him with the opportunity to call "Georgie" as a witness:

> "The Court: . . . Are you going to call her?
>
> Mr. Todel: I do not think she would add anything at this particular time to the trial, because I feel that I would have to do further investigation to determine whether or not I would use her at this time (G.A. 138)." [9]

Obviously, trial counsel did not call her because she had nothing to offer, for or against, the defendant. This is precisely the type of situation to which the Court referred in its instructions to the jury (G.A. 153-154) which was entirely appropriate.[10]

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[9] At no time following his interview with "Georgie" did Mr. Todel request a continuance or even a short adjournment in order to pursue this "further investigation" that he mentioned.

[10] In a recent decision of this Court it was held that a jury may draw no inference from the fact that the Government has

[Footnote continued on following page]

Concededly, had appellant made a showing that either "Georgie" or "Toni" was material to the defense case, the Government would have had the duty to produce them, or at least assist defense counsel in finding them. *Roviaro* v. *United States, supra.* But such a showing did not occur. Counsel for the appellant was able to represent nothing more than the fact that they were present in the bar at certain times when Rodas met with the appellant. Neither party was ever alleged to have been a participant in the transaction, nor even the means by which the participants met one another.

> "As such [their] production at trial was not required, nor any hearing into [their] unavailability, unless the appellant could make a showing of prejudice stemming from their absence. And no such showing has been made out here. Indeed, the only indication of the [women's] possible testimony . . ., suggests that [their] testimony would have corroborated the government's case." *United States* v. *DeAngelis,* 490 F.2d 1004, 1010 (2d Cir. 1974).

Finally, appellant's reliance on *United States* v. *Baum,* 482 F.2d 1325 (2d Cir. 1973) is unfounded.

Appellant's allegation, purportedly supported by *Baum,* is apparently that the appellant was somehow prejudiced by the failure of the Government to disclose "Georgie's"

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failed to call witnesses that are "equally unavailable" to the defense. *United States* v. *Brown,* — F.2d —, (2d Cir. slip opinion, 1847, 1856-1857, decided February 20, 1975); *see also, United States* v. *Super,* 492 F.2d 319, 323 (2d Cir. 1974).

In the instant case "Georgie" was as available to one side as the other, and "Toni" was "equally unavailable" (G.A. 138). Under the circumstances, the Court charged the jury properly (G.A. 153-154). In *Brown,* appellant's contention that it was improper to instruct the jury that no unfavorable inference could be drawn under these circumstances was characterized by Judge Medina as "pure humbug". *Supra,* at 1856.

identity until the trial. The factual situation in *Baum* was totally different than the one here, and where reversal may have been appropriate there, it is not in this case.

The "mystery" witness in *Baum* was a sentenced federal prisoner who had volunteered his testimony to the Government in the hope that it would shorten his prison term. His testimony was critical to both the Government's case and the defendant's case inasmuch as it went to a critical issue—knowledge. He was not a reluctant witness, nor was there any reason to be concerned for his safety. Finally, the other evidence in the case was, in this Court's opinion, very "close". (482 F.2d at 1332). Substantial cross-examination of this witness was required, and adequate preparation time was imperative, especially since there existed "hard" evidence with which to impeach him.[11] This Court held that defense counsel's motion for postponement should have been allowed, especially in light of the fact that the entire trial took only one day.

In this case, trial counsel's "feelings of *deja vu*" are misplaced (Appellant's Brief p. 34). This trial proceeded over a period of eight days, only four of which were taken up in Court.[12] He had ample opportunity to do whatever research or preparation he wished. The thrust of his efforts (had he made any) during the continuance would have been significantly different, than those he hoped to make in *Baum*, since the witnesses with whom he was so concerned, hadn't even been called. In fact the Government expressly announced that it had no intention of calling either one of them. Clearly, their testimony was insignificant compared to that of the witness in *Baum, supra,* Point I. In any event, "Georgie" *was* made available and appellant's counsel declined to call her.

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[11] The witness denied ever having received a certain check from the defendant and defense counsel requested a short continuance in order to, *inter alia*, produce the check. *Supra* at 1330.

[12] The trial began on September 24, 1974. At the end of the next day's session (September 25, 1974) the trial was adjourned over a "four day weekend" until September 30, 1974.

As for appellant's allegation that "there was no reason whatsoever advanced why the identity of this [sic] witness could not have been revealed earlier in the trial or, for that matter, immediately before trial" (Appellant's Brief p. 36), the record is replete with numerous references to the Government's concern for the physical safety of Rodas and the others (G.A. 1-5, 9-11). The people involved in this case were not in protective custody as was the witness in *Baum*, and the Government did not have control over their activities. *Supra,* at 1331.

In summary, appellant's attorney offered no showing of how appellant was prejudiced at the trial and there has not yet been any further showing that he would have tried the case any differently had the Government supplied him with everything he now claims he was entitled to long before the trial began.

POINT III

Appellant's argument that the admission of testimony referring to events subsequent to March 25 was improper is without merit.

Appellant, as an apparent afterthought, mistakenly contends that the District Court erred in allowing testimony "beyond the period of the conspiracy." First of all, no conspiracy was alleged in this indictment. Judge Judd acted well within his discretion in allowing the jury to hear of a conversation which related directly to the transaction charged. It has been held many times that the District Court has a certain amount of latitude in permitting evidence which will give the jury as good a perspective as possible of the facts in the case, especially where the other evidence of guilt in the trial is overwhelming. *See, United States* v. *Tirinkian,* 488 F.2d 873, 875 (2d Cir. 1973).

It is absurd to suggest that the jury was improperly prejudiced by this testimony especially in light of the Court's specifically limiting instruction (A. 48a). The evidence was probative, competent, material and, therefore, properly allowed.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: March 12, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
ETHAN LEVIN-EPSTEIN,
Assistant United States Attorneys,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Lydia Fernandez being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 14th day of March 1975 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Irving Anolik, Esq.
225 Broadway
New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
14th day of March 1975

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501956
Qualified in Kings County
Commission Expires March 30, 197